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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gary Nerdig, et al.,

10 Plaintiffs,

11 v.

12 Electric Insurance Company,

13 Defendant.
14

No. CV-17-01859-PHX-GMS

ORDER

15 Pending before the Court is the Motion for Partial Summary Judgment¹ of
16 Defendant Electric Insurance Company (Doc. 27). For the following reasons, the Court
17 grants the motion.

18 **BACKGROUND**

19 In November 2014, Plaintiff Gary Nerdig was stopped in his company's vehicle
20 on the I-17 and was hit from behind by a vehicle operated by a non-party, Lidia Elisa
21 Martinez. Mr. Nerdig was injured and required multiple surgeries. Ms. Martinez's
22 insurance company paid its policy limit to Mr. Nerdig, for a total of \$15,000. The
23 company vehicle Mr. Nerdig was driving was insured by Travelers Insurance Company.
24 It included underinsured motorist coverage ("UIM") up to a \$1,000,000 limit. This policy
25 was the primary UIM coverage. Defendant, Electric Insurance, provides Plaintiffs'

26
27 ¹ Electric has not moved for summary judgment on Count II, a request for the trier
28 of fact to determine the amount of damages that Mr. Nerdig is legally entitled to recover.
Therefore, the Court construes this as a Motion for Partial Summary Judgment and does
not address Count II.

1 personal automobile insurance. Electric's policy has a UIM coverage limit of \$250,000,
2 and is in excess to the Travelers insurance.

3 Electric was informed by Plaintiffs' counsel about its possible exposure in January
4 2016. Electric did not begin an investigation at that time, but Electric did monitor the
5 investigation undertaken by Travelers. Plaintiffs' counsel sent other letters to Electric in
6 February 2016 asking for Electric to identify documents that would be needed to review
7 the claim. Electric did not respond to the letters. On March 20, 2017, Plaintiffs sent a
8 demand letter to both Travelers and Electric, requesting a payment of the full policy limit.
9 Travelers issued a payment of \$1,000,000 to Mr. Nerdig on March 24, 2017. Electric
10 began evaluating Mr. Nerdig's claim on March 28, 2017, after being informed that the
11 UIM coverage from Travelers was exhausted.

12 Electric assigned the claim to defense counsel on April 12, 2017. Defense counsel
13 requested Mr. Nerdig to undergo an Examination Under Oath ("EUO"), an Independent
14 Medical Examination ("IME"), and to authorize Electric to obtain additional medical
15 records. Electric's contract with Mr. Nerdig provides that an insured may be required to
16 submit to the above requests. On April 28, 2017, Electric offered Mr. Nerdig \$50,000.
17 Plaintiffs, Mr. Nerdig and his wife, filed suit on May 15, 2017, alleging breach of
18 contract and bad faith. Electric has now moved for summary judgment on such claims,
19 Counts I and III of the Complaint.

20 DISCUSSION

21 I. Legal Standard

22 Summary judgment is appropriate if the evidence, viewed in the light most
23 favorable to the nonmoving party, demonstrates "that there is no genuine dispute as to
24 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.
25 P. 56(a). Substantive law determines which facts are material and "[o]nly disputes over
26 facts that might affect the outcome of the suit under the governing law will properly
27 preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
28 248 (1986). "A fact issue is genuine 'if the evidence is such that a reasonable jury could

1 return a verdict for the nonmoving party.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d
2 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). When the nonmoving
3 party “bear[s] the burden of proof at trial as to an element essential to its case, and that
4 party fails to make a showing sufficient to establish a genuine dispute of fact with respect
5 to the existence of that element, then summary judgment is appropriate.” *Cal.*
6 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th
7 Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).

8 **II. Analysis**

9 **A. Breach of the Implied Covenant of Good Faith and Fair Dealing**

10 In Arizona, “there is a legal duty implied in an insurance contract that the
11 insurance company must act in good faith in dealing with its insured on a claim, and a
12 violation of that duty of good faith is a tort.” *Noble v. Nat’l American Life Ins. Co.*, 624
13 P.2d 866, 868 (Ariz. 1981). Where an insurer “intentionally and unreasonably denies or
14 delays” payment of a claim, the insurer has breached the duty of good faith. *Rawlings v.*
15 *Apodaca*, 726 P.2d 565, 572 (Ariz. 1986). A plaintiff must show (1) “the absence of a
16 reasonable basis for denying benefits of the policy” and (2) “the defendant’s knowledge
17 or reckless disregard of the lack of a reasonable basis for denying the claim.” *Noble*, 624
18 P.2d at 868. Thus, the “initial inquiry consists of an objective finding, i.e., whether the
19 insurer acted unreasonably, [and] the second inquiry focuses on the insurer’s conduct and
20 whether the insurer *knew* that its conduct was unreasonable or acted with such reckless
21 disregard that such knowledge could be imputed to it.” *Deese v. State Farm Mut. Auto.*
22 *Ins. Co.*, 838 P.2d 1265, 1268 (Ariz. 1992). A plaintiff “may simultaneously bring an
23 action for both breach of contract and for bad faith, and need not prevail on the contract
24 claim in order to prevail on the bad faith claim.” *Id.* at 1270. Plaintiff argues that Electric
25 breached its duty of good faith by failing to immediately conduct an investigation when it
26 was informed of its potential exposure in January 2016 and that Electric’s requirements
27 that Mr. Nerdig submit to EUOs, an IME, and medical authorizations constituted
28 unnecessary procedural hoops.

1 Both parties agree that the “Electric underinsured motorist coverage was excess to
2 the underinsured motorist coverage afforded by Travelers.” (Doc. 28, ¶ 7; Doc 30, ¶ 7).
3 Under Arizona law, “[u]ntil a primary insurer offers its policy limit, the excess insurer
4 does not have a duty to evaluate a settlement offer, to participate in the defense, or to act
5 at all.” *Twin City Fire Ins. Co. v. Burke*, 63 P.3d 282, 287 (Ariz. 2003); *see also Geurden*
6 *v. Quantum Transportation LP*, 298 F.Supp.3d 1222, 1228 (D. Ariz. 2018) (“An excess
7 insurer has no duty to defend its insured unless the primary insurer exhausted its policy
8 limit to defend the insured.”). Plaintiffs assert that these cases are not relevant because
9 they do not deal with UIM coverage. While true, Plaintiffs do not explain why an insurer
10 with UIM coverage that specifies that it is in excess to other policies should be in a
11 different position than an insurer with other excess coverage. Electric was informed that
12 Travelers had tendered their UIM limit to Mr. Nerdig on March 28, 2017. (Doc. 28, Ex.
13 B, p. 2). Electric began its evaluation of Mr. Nerdig’s claim on the same day. (Doc. 28,
14 ¶ 13; Doc. 30, ¶ 13). Plaintiffs cannot meet their burden of proof and cannot show that
15 Electric unreasonably delayed its evaluation of the claim.

16 Plaintiffs also assert that Electric acted in bad faith by requiring Mr. Nerdig to
17 submit to EUOs, an IME, and to sign medical authorizations. Mr. Nerdig’s contract with
18 Electric provided that the insured must “[s]ubmit as often as we reasonably require [t]o
19 physical exams by physicians we select [and] [t]o examination under oath.” (Doc. 30, Ex.
20 D). It also required the insured to “[a]uthorize [the insurer] to obtain medical reports.” *Id.*
21 Electric requested Mr. Nerdig’s availability for an EUO, an IME, and medical record
22 authorizations on April 26, 2017. Courts have held that insurers may not use EUOs and
23 IMEs to delay the process and breach the duty of good faith and fair dealing. But
24 Plaintiffs here have provided no such evidence of an intent on Electric’s part to use the
25 contractual terms in bad faith. Plaintiffs have noted that the primary UIM insurer,
26 Travelers, did not request any additional information. But that is hardly relevant as to
27 whether Electric acted in bad faith by seeking additional information, especially when:
28 (1) the Defendant did receive additional relevant documents pursuant to the signed

1 authorizations that were relevant to the merits of the Plaintiff's claims; and (2) the
2 evaluation of plaintiff's damages may change over time; and (3) the evaluation of the
3 sufficiency of plaintiff's damage payments may be in a different posture after he had
4 received the additional excess payment from Travelers than it was before that payment.
5 Although it might not have changed the damages themselves, it might have informed an
6 assessment of the Plaintiff's ability to meet his ongoing needs in light of the additional
7 payment. Plaintiffs also note that two IME reports already existed, but Electric's desire
8 to have a more up-to-date IME report does not demonstrate bad faith. In *Demetrulias v.*
9 *Wal-Mart Stores Inc.*, the court found that a fact issue for the jury existed where the
10 insurance adjuster's notes said that the purpose of the IME was "to limit the extent of the
11 injury." 917 F.Supp.2d 993, 1007 (D. Ariz. 2013). Similarly, in *Mendoza v. McDonald's*
12 *Corp.*, the court held that although an insurer was "entitled to seek an independent
13 medical examination regarding [the insured's] need for treatment," the claim file
14 reflected that the IME was sought "for the purpose of 'cutting' or closing [the insured's]
15 claim." 213 P.3d 288, 308 (Ariz. Ct. App. 2009). Unlike *Demetrulias* and *Mendoza*,
16 Plaintiff offers no admissible evidence that the purpose of the IME was "to limit the
17 extent of the injury."

18 As *Montoya Lopez v. Allstate Ins. Co.* makes clear, the burden is on the Plaintiff to
19 demonstrate some relevant fact that would demonstrate pretext beyond its mere
20 supposition. 282 F.Supp.2d 1095, 1101 (D. Ariz. 2003) ("[W]hile [the insured's] claim
21 that the request for an interview was a pretext, if true, might prove bad bath, [the insured]
22 does not present any evidence that the request was pretextual. . . . [T]he claim that it was
23 just another 'hoop' for [the insured] to jump through is merely a feeling that [the insured]
24 had; it is not supported by any evidence such as the absence of a requirement or practice
25 that the adjuster speak with the insured."). Plaintiffs have cited no evidence, whether
26 from depositions or documents or experts, which indicate any of the steps Electric took
27 were done to delay or deny coverage. As for the EUO and the additional medical
28 authorizations, Plaintiffs claim that Electric gained virtually no new information from

1 these inquiries. But, the relevant question is not whether the additional inquiries resulted
2 in pertinent information; rather, the question is whether Electric requested the additional
3 information in good faith.

4 The Court grants Electric's Motion for Summary Judgment on the claims of
5 breach of good faith relating to the timing of Electric's investigation and Electric's
6 requests for additional information. Electric did not move for summary judgment on
7 Plaintiffs' claims that Electric made a lowball offer in bad faith. Therefore, those claims
8 are not dismissed.

9 **B. Breach of Contract**

10 Under Arizona law, a claim for breach of contract has three elements: (1) a
11 contract exists between the plaintiff and the defendant; (2) the defendant breached the
12 contract; and (3) the breach resulted in damage to the plaintiff. *See Frank Lloyd Wright*
13 *Foundation v. Kroeter*, 697 F.Supp.2d 1118, 1125 (D. Ariz. 2010). Mr. Nerdig has not
14 established that Electric breached its contract. In general, a breach of an insurance
15 contract "occurs when the insurer denies the insured the relevant coverage." *Clark*
16 *Equipment Co. v. Arizona Property and Cas. Ins. Guar. Fund*, 943 P.2d 793, 800 (Ariz.
17 Ct. App. 1997) (citing *Holt v. Utica Mut. Ins. Co.*, 759 P.2d 623, 628 (Ariz. 1988) and
18 *Bluetreich v. Liberty Mut. Ins. Co.*, 826 P.2d 1167, 117-71 (Ariz. Ct. App. 1991)); *see*
19 *also Mora v. Phoenix Indem. Ins. Co.*, 996 P.2d 116, 121 n.5 (Ariz. Ct. App. 1999)
20 ("[T]he mere fact that an insurer does not accept an offer to settle within the deadline set
21 by the settlement demand does not automatically constitute a breach of the contract.").
22 This is because "the nature and extent of the breach, and the damages flowing from it,
23 can be determined only after a claim has been *definitively* denied and negotiations
24 between insurer and insured have ceased." *Clark*, 943 P.2d at 800. Electric argues that it
25 simply disagreed with Mr. Nerdig's valuation of his claim, requested additional
26 authorizations to investigate the claim, and offered a \$50,000 payment. Electric states
27 that Mr. Nerdig sued for breach of contract prior to the investigation being completed.
28 (Doc. 27, p. 16). Mr. Nerdig's Response does not refute the fact that the lawsuit was

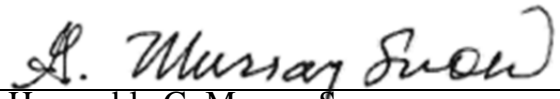
1 brought prior to the completion of the investigation and negotiations. Essentially, Mr.
2 Nerdig's claim for breach of contract is not ripe because Mr. Nerdig sued before any
3 alleged breach was actualized. Moreover, Mr. Nerdig's Response does not contain any
4 discussion of facts which would support a finding that the claim exceeded \$50,000. Mr.
5 Nerdig bears the burden of proof at trial, and cannot prove the case simply by asserting
6 that he is entitled to the full policy limit.

7 **CONCLUSION**

8 As an excess insurer, Electric had no duty to investigate the claim until the
9 primary insurance was exhausted. Electric did not breach its duty of good faith by
10 waiting until the primary insurance was exhausted to begin an investigation. Similarly,
11 Electric did not breach its duty of good faith by requesting Mr. Nerdig to provide further
12 medical information. Although such steps could constitute bad faith if done with the
13 intent to delay or deny payment, Mr. Nerdig has presented no evidence from which a jury
14 could conclude that Electric acted in bad faith. The Court grants summary judgment to
15 Electric on those aspects of the breach of the implied covenant of good faith claim. Mr.
16 Nerdig cannot demonstrate that Electric breached their contract. Mr. Nerdig filed suit
17 before negotiations and investigations had been completed, and Electric had not
18 definitively denied coverage. Mr. Nerdig has not presented evidence that would allow a
19 jury to conclude he was entitled to more than what Electric offered; his belief is not
20 enough. The Court grants summary judgment to Electric on the breach of contract claim.

21 **IT IS THEREFORE ORDERED** that Defendant Electric Insurance Company's
22 Motion for (Partial) Summary Judgment (Doc. 27) is **GRANTED**.

23 Dated this 31st day of August, 2018.

24 
25 Honorable G. Murray Snow
26 United States District Judge
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